Supreme Court, U.S.
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No. 85-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. (BOB) PARK d/b/a
ACTION REAL ESTATE,

Petitioner,

v.

EL PASO BOARD OF REALTORS, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

S. ANTHONY SAFI
GRAMBLING & MOUNCE
P.O. Drawer 1977
El Paso, Texas 79950-1977
(915) 532-3911

Counsel for Respondents

BEST AVAILABLE COPY

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The list appearing on page ii of the Petition is inaccurate or incomplete in the following respects:

1. Neither the National Association of Realtors nor the Texas Association of Realtors has ever been a party to this case.
2. Donald M. Love, Jr., was an Appellant in the Court of Appeals, but his appeal was dismissed, on his Motion, on July 25, 1984.
4. Moorhead, Inc., was an Appellant in the Court of Appeals, but its appeal was dismissed on joint motion of the parties.
6. E. Dempsey Gunaca was not an Appellant in the Court of Appeals; he was a Cross-Appellee.
7. Bruce B. Shields was not an Appellant in the Court of Appeals; he was a Cross-Appellee. He died on February 5, 1985.
8. Raymond Baca was not an Appellant in the Court of Appeals; he was a Cross-Appellee.
9. Wayne L. Moorhead was not an Appellant in the Court of Appeals; he was a Cross-Appellee. The appeal against him was dismissed on joint motion of the parties.
10. Cecil D. Clark was not an Appellant in the Court of Appeals; he was a Cross-Appellee.
11. Ralph K. Tutor was not an Appellant in the Court of Appeals; he was a Cross-Appellee.

None of the corporate Respondents have any existing parent, subsidiary, or affiliated corporations.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents El Paso Board of Realtors, Mark I Realty, Inc., C & H Realty, Inc., E. Dempsey Gunaca, Bruce B. Shields (Deceased), Raymond Baca, Cecil D. Clark, and Ralph K. Tutor, respectfully request that this Court deny the Petition for Writ of Certiorari.

REPORT OF OPINION

The opinion delivered by the Court of Appeals is reported as *Park v. El Paso Board of Realtors*, 764

F.2d 1053 (5th Cir. 1985). The opinion attached to the Petition as Appendix B does contain numerous typographical errors, which are not included in the reported opinion.

STATEMENT OF THE CASE

Petitioner's eighteen page "Statement of the Case" provides an incomplete and, in many respects, incorrect summary of the evidence in this case. Because this is basically a sufficiency of the evidence case, Petitioner should have, but has not, provided a fair summary of all of the evidence material to the questions presented.

We shall not consider every factual inaccuracy or omission contained in the Petition. We do, however, provide the following material facts in addition to those stated in the opinion of the Court of Appeals:

A. The Board and the Market

The El Paso Board of Realtors, sometimes referred to as the "Board", is chartered as a Texas non-profit corporation. It is affiliated with the National Association of Realtors ("NAR"), a national real estate brokerage trade association.[1] The active and associate members of the Board are primarily real estate licensees residing in El Paso County, Texas. (D. Bd. Exs. Q, U-7; XV Tr. 3289-91).

The Board engages in, and supports, educational programs for its members and others, and provides various other services to its members and to the community (II Tr. 130-31). One of the key services pro-

[1]The term "Realtor" is a trademark belonging to NAR, which licenses its use to others.

vided by the Board is its Multiple Listing Service ("MLS").

After obtaining a written listing agreement, a Board member that is also an MLS participant submits data on the property to the MLS. The Board compiles the essential information on the various listings, provided by the "listing" brokers, into book form, and also into a computer bank, for use by other participants (I Tr. 45-47, 75; D. Bd. Ex. P).

The placement of a listing in the MLS by the listing broker is a "blanket unilateral offer of subagency to the other Participants" (D. Bd. Ex. L, p. 1-1), which another participant is under no obligation to accept, but may choose to accept if he obtains a purchaser for the property covered by the listing (II Tr. 229-30, 247; VIII Tr. 1571; XIV Tr. 3085). Park agreed at trial that he had "never taken the position . . . that anyone has to work on (his) listings at all" (IV Tr. 891).

The listing brokers specify, on each listing filed with the MLS, the compensation offered to other MLS participants for their subagency services (D. Bd. Ex. P, Art. G, § 1). Because participants are free to choose upon which MLS listings, if any, to work, a salesman may naturally choose to show a listing that provides for a higher subagency compensation in the event of sale than one that provides for a lower subagency compensation (II Tr. 238; IX Tr. 1741). Although the publication of the subagency compensation offer in the MLS digest does result in some exchange of price related information, this "is necessary because the cooperating broker has the right to know what his compensation should be prior to his endeavor to sell" (D. Bd. Ex. L, p. 6-4).

The Board's MLS benefits property buyers, property sellers, and brokers and salesmen, and benefits society generally because it promotes competition in the real estate brokerage market by reducing entry barriers, increases economic efficiency, promotes economic growth, and tends to reduce housing discrimination (D. Bd. Ex. H-9; XV Tr. 3284-89).

B. Alleged Price Fixing

The Court of Appeals did not determine whether substantial evidence supported the price-fixing allegation, because such a determination was unnecessary to its disposition of the case. We shall discuss some of the evidence, however, in order to correct, and place into context, Petitioner's claims.

The Board's MLS was organized in 1952, but no evidence touched on its first seven years of operation. The 1959 Board bylaws contained a fee schedule, but, as acknowledged, Pet. 5, it was recommended, not mandatory.[2]

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[2]The claim, Pet. 5-6, that the Board "controlled both commission rates and cross-sale fee division" from the "inception of the MLS in 1952" is totally unsupported by the evidence. Pet. 6 n.1 claims that the Board's promulgation of fee schedules after 1950 "is singularly remarkable" in light of *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950) ("mandatory" fee schedule in Washington, D.C. illegal), but fails to note significant aspects of that case. The case was decided under Section 3, not Section 1, of the Sherman Act. This Court noted that "no interstate commerce is involved" in the real estate brokerage activities at issue in that case. *Id.* at 488. For thirty years after the decision, real estate brokerage activities, including alleged price fixing, were generally held not to have the required interstate commerce nexus to sustain Sherman Act Section 1 jurisdiction. *See McLain v. Real Estate Board*, 444 U.S. 232 (1980).

In 1966, the MLS did adopt a rule concerning minimum commissions on those listings submitted to the MLS.[3] The evidence failed to disclose the effect, if any, of the 1966 rule. The evidence introduced tended to show that it was short-lived and largely ignored (II Tr. 172, 180, 184-85, 227-28; IX Tr. 1822-24, 1827, 1829; XIV Tr. 3031-32, 3047).

Although the record clearly shows that any reference to a minimum commission was removed from the RLS rules no later than January of 1971, the reference may have been deleted prior to that time (D. Bd. Ex. J; XIV Tr. 3048-49). The Board's bylaws, at least as far back as May of 1967, made absolutely no reference to recommended commissions (D. Bd. Exs. E, F (1967), G (1969)).

In any event, after 1966, but before 1971, several firms started asking for a seven, as opposed to a six, percent commission, without any evidence whatsoever of Board involvement. The evidence undisputedly showed that the change in the level of the most common listing commission from 6% to 7% during 1969-70 for certain firms[4] came about as the result of

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[3]The assertion that the 1966 amendment "codified and continued" an existing policy is unsupported by record reference or by evidence. None of the individuals responsible for adopting it (P. Ex. 428, tab 14) were trial defendants. The record references provided at Pet. 4-5 do not support the assertion that non-party Dennis Wagner admitted the Board had been guilty of price-fixing, or that the Realtors decided to fix prices because the lawyers were; or that he was one of the "deans" of the real estate business in El Paso.

[4]Contrary to assertion, Pet. 7-8 the records of only seven—not 14—firms—none of which are parties hereto—were produced for the 1969-71 period (P. Exs. 421 (1), (4), (7), (8), (9), (10), (14)).

independent business decisions relating to such factors as increasing costs, and competition for agents, but did not occur in a "coordinated" fashion, or in the space of only one month (II Tr. 194-95, 198-99, 244-46; IX Tr. 1736-42, 1823-25; XIV Tr. 3160-61).

The Board executive vice president wrote the RLS participants on June 25, 1971 (D. Bd. Ex. K), and stated as follows:

> *I also wish to remind you that the El Paso Board of Realtors does not have a recommended schedule of fees to be charged for services rendered by its members, nor do we direct the co-operating brokers in a sale what the commission split shall be* (original emphasis).

This letter also asked members to destroy any old rules in their possession, as a completely new set of rules (without any reference to recommended total commissions or divisions) was forthcoming (XIV Tr. 3043-45).

On November 15, 1971, NAR adopted its Fourteen Points of Multiple Listing Policy (D. Bd. Ex. L, p. 6-1), for the guidance of local boards. The first two points provided as follows:

> 1. MLS shall not: Fix, control, recommend, suggest or maintain commission rates or fees for services to be rendered by Members.
>
> 2. MLS shall not: Fix, control, recommend, suggest or maintain any percentage division of commissions or fees between cooperating Members and between Members and non-members.

As discussed above, the El Paso Board had already repudiated recommended commission rates and di-

visions prior to NAR's adoption of the Fourteen Points. All Board documents thereafter continued to adhere to the policy of in no way suggesting or recommending total commissions, or commission divisions between listing and cooperating brokers (*e.g.*, D. Bd. Exs. H, I, M, N; XIII Tr. 2836-37), and reiterated the policy that it did "not fix, control, recommend, suggest, or maintain commission rates or fees for services to be rendered by members" (D. Bd. Ex. 0, Art. C., § 7; D. Bd. Ex. P, Art. C, § 8).

Thus, the long-established policy of the Board, displayed prominently on the cover of MLS listing books, provides that:

> 1. The broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the broker and his or her client, and is not fixed, controlled, recommended, or maintained by any persons not a party to the listing agreement.
>
> 2. The subagency compensation paid by a listing broker to a cooperating broker in respect to any listing is established by the listing broker in his offer of subagency, and is not fixed, controlled, recommended or maintained by any persons other than the listing broker and his or her subagent.

(P. Ex. 431; IX Tr. 1843-45).

Petitioner's economist George[5] justified his "opinion" (admissibility challenged) simply on the basis that

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[5]George admitted that he had only worked on one prior antitrust case, in which his brother was the plaintiff, Mr. Price was also the plaintiff's lawyer, and the relevant market was

most listing commissions he examined for the 1970s were at a 7% figure.

As recognized, the degree of listing commission uniformity declined steadily from the second quarter of 1977 through the first quarter of 1980, to a percentage of only 75.9%. Even these percentages are inflated, however, because George admitted (after an initial denial) that he (or Park) arbitrarily deducted certain non-7% listings, which overstated the percentage of listings at 7% (XI Tr. 2368-75; note, p. 4, P. Ex. 18; *compare* P. Exs. 4, 6, and 8 through 18 to P. Ex. 422-7). Petitioner introduced no evidence at all concerning commissions after the first quarter of 1980.

In any event, the competitiveness of a market may not be gauged by price uniformity alone, because price uniformity is just as consistent with competition as with collusion (XV Tr. 3295-99, 3339; D. Bd. Ex. A-10). Price uniformity over time is especially insignificant where the price of the service is expressed as a percentage of the price of a commodity expressed in dollars, because a firm charging a percentage commission might be able to cover increasing costs, without changing its commission (XII Tr. 2659-61).

Factors that do indicate a competitive market include lack of concentration; low market entry barriers; mobility of firms within the market; and lack

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retail high fidelity stereo equipment in Austin, Texas. This was the *only* other unregulated market George ever studied professionally. George had *never* before studied any market dealing with the sale of personal services, had *never* before made a study of any real estate brokerage market, and, for all the evidence showed, had *never* before made a price-fixing study of *any* market (XII Tr. 2623-25, 2629-31).

of excess profits (D. Bd. Exs. Z-9, A-10; XII Tr. 2716; XV Tr. 3254-58, 3295-300, 3411; XVI 3646-48). The El Paso resale residential brokerage market displays all of these characteristics. Petitioner's own economist testified that, because of the high number of firms, low entry barriers, and internal mobility, the El Paso residential real estate brokerage market structure was "very competitive." (XI Tr. 2246, 2259, 2271, 2273; XII Tr. 2631). Defense economist Dr. Gilbert concluded, based on these factors, that price fixing had not occurred (XV Tr. 3312, 3335, 3367).

C. Petitioner John Robert (Bob) Park

Petitioner, a high school drop-out, joined the service in 1942, and served as an enlisted man for over 22 years (II Tr. 251-52). He obtained a real estate salesman's license in late 1965 because he needed "a part-time or a supplemental occupation" in view of his impending retirement from the Army (II Tr. 253-54). He worked as a salesman with various El Paso brokerage firms for several years. From 1969 through 1974, he engaged in real estate brokerage as a sole proprietor, primarily in the Sherman-Denison area of North Texas. These endeavors were not financially successful (II Tr. 254, 262-64; V Tr. 930-32).

In January of 1975, Park returned to El Paso, and opened a brokerage firm under the name Action Real Estate (II Tr. 265). Even though his operations in North Texas had not been financially successful, Park continued to use a relatively low flat fee brokerage commission policy when he returned to El Paso (II Tr. 266).

During 1975, Park chose not to join the Board, and thus did not avail himself or his clients of the MLS or other Board services. For 1975, he showed a net pre-tax accounting profit of only $536.16 (IV Tr. 805-06; D. Bd. Ex. J-2, Schedule C).

In March of 1976, Park applied for membership in the Board (IV Tr. 792-93; D. Bd. Ex. A). Park's application was handled like all others. (IV Tr. 794-95; D. Bd. Ex. C). No one objected to Park's membership application and he was promptly admitted to membership (IV Tr. 795; XIV Tr. 3028). As part of the application process, Park agreed in writing to resolve all disputes with fellow Realtors in accordance with the NAR Code of Ethics, and the Board's By-laws, Rules and Regulations, which provide for arbitration of disputes between members (D. Bd. Exs. A, D).

After being admitted to the Board, Park applied in April of 1976 for membership in the MLS (D. Bd. Ex. B). In his application to become an MLS participant, Park stated that he had read, and agreed to abide by, the Board's MLS Rules and Regulations, which in no way sought to control or recommend commission rates of, or division of commissions between, members (IV Tr. 796-98; D. Bd. Ex. N).

Park attempted to obtain listings by advertising that his relatively low flat fee commission could save the seller money (P. Ex. 228). Park stated, however, that his actual method of pricing the home of a seller that listed with him was, "what others had sold for in that area, and then take the 7% off and add the $950.00 to it" (VII Tr. 1288-89; *see also* IV Tr. 807). This pricing procedure did not net the home owner any more money (VII Tr. 1289-90).

Park concentrated most of his efforts in obtaining new listings, as opposed to selling existing listings (V Tr. 905). Most of the sales of Park's listings were effectuated by other MLS participants. During the year 1977, 59% of Action's listings were sold through the efforts of other Board members (IV Tr. 886-87; P. Exs. 168, 169).

Similarly, for the first half of 1978 (prior to the filing of this suit in August 1978), and even for the two years after Park filed the suit, the number of Action MLS listings that were sold by other members of the Board exceeded the number of Action MLS listings that it sold (V Tr. 918-19, 921; P. Exs. 170, 171, 172, 173). In July of 1978 - days before Action filed the suit - Action had its best month of the year; ten Action listings were sold by other Board members (V Tr. 915-16). In fact, for every year during the period 1976 through 1980, a larger percentage of Action's sales were generated by cooperating brokers (subagents) than the average for all MLS participant firms (XV Tr. 3359-61; D. Bd. Ex. R-9). Additionally, the percentage of total Action listings placed in the MLS that were subsequently sold, through the efforts of other participants, exceeded the comparable percentage of most of the other MLS participant firms (XV Tr. 3361-63; D. Bd. Ex. S-7).

Park's net income from his real estate brokerage business increased dramatically, after joining the Board and availing himself of the MLS and other Board services, as compared to the $536.16 that he cleared in 1975. For the years for which data was introduced into evidence, Park's net accounting profit of $18,433.00 for 1978 - the year he filed the suit against the Board and over 50 of its members - was

exceeded only by his net accounting profit of $20,110.00 for the year 1980 (D. Bd. Exs. M-2, 0-2). Park admitted that Action Real Estate in El Paso was "financially the most successful business" that he ever had (V Tr. 933). Park's economist stated that he "for sure" was a beneficiary of the MLS system, and that he "would be hurt" if there were no MLS (XII Tr. 2577-78).

Park's attainment of this modest level of success was not without incident, however. Given the economic imperative of obtaining listings, and obtaining purchasers for listings, together with the large number of competitors in the market, hard competition for listings, and prospective purchasers, is the norm. This was no doubt true during the 1978-82 period, when adverse economic conditions caused the number of residential resale transactions handled through the Board's MLS to drop from 4,301 in 1978 to an annualized figure of only 2,518 in 1982 (D. Bd. Ex. C-10; XVI Tr. 3495).

Some of Petitioner's competitors may have resorted to "dubious tactics" to stay afloat.[6] Whether competent evidence shows that any of them did so pursuant to any conspiracy will be determined on retrial; most of those already tried were cleared of the boycott charge.

In any event, the Board itself had no involvement in any such "dubious tactics." Park served on the Board's MLS Committee during the first half of 1978.

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[6]Park's surly personality -- described as rude, unfriendly, and threatening -- perhaps exacerbated the natural tendency for conflicts with competitors (III Tr. 529; VIII Tr. 1693-94; IX Tr. 1756, 1780, 1794; X Tr. 2022, 2171-72; XIV Tr. 3031, 3226).

During his tenure on the MLS Committee, Park never reported any complaint concerning the MLS, or its operation, rules, regulations, or members; he admitted that within the Board and the MLS Committee, he "never opened (his) mouth" (V Tr. 940-135-36).[7]

D. Professional Standards Committee ("PSC") Complaints

The Professional Standards Committee adjudicated complaints of unethical behavior made against Board members.[8] No evidence supports Petitioner's claim that the committee was an "effective weapon against Park."

The committee had no control over what complaints were brought to it (II Tr. 140). Its work was performed by unpaid volunteers, who performed to the best of their ability (VII Tr. 1416; XIII Tr. 2897-98, 2916). The committee "bent over backwards" to give every person the benefit of the doubt, and it did not treat Park any differently than it treated everyone else (VII Tr. 1362). Park was told that if he felt that he was not receiving fair treatment, he should contact the president of the Board and ask for a special committee, and was invited to appear personally before the committee, but never did either (XIII Tr. 2809-10, 2900, 2906-07, 2914-15).

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[7]During 1978 Petitioner did spend about one-third of his time preparing for this suit, and devoted hundreds of hours to covertly taping conversations (V Tr. 940-5 - 940-11; 940-87 - 940-89).

[8]Petitioner misquotes the record concerning the characterization of the committee (*compare* Pet. 13 to VII Tr. 1310).

1. Ristom Complaints

Contrary to intimation, Pet. 13, the committee totally cleared Park on the first complaint (VI Tr. 1255; VII Tr. 1430-32; XIV Tr. 3026-27).

The second Ristom complaint involved an aborted attempt by Ristom's agent Teresa Almanzan to cooperate in the sale of an Action listing (VII Tr. 1433-34). Almanzan took prospective purchaser Mrs. Zamora to see the house, and procured a proposed earnest money contract signed by Mr. and Mrs. Zamora. When she advised Park that she was holding the contract, he told her that she "was just trying to cheat him out of a commission." When Action's client, after speaking to Park, refused to sell the house on the agreed terms if Almanzan was involved, she did not deliver the contract to Action, so as not to jeopardize the sale. Ristom furnished the proposed contract, signed by the purchaser, to the committee's investigator (VII Tr. 1349; P. Ex. 420, tab 3, Zamora and Almanzan stmts., 10-14-77 contr.)

Ray O'Connor, the Action salesman involved in this transaction, admitted at trial that where agents from different firms "work the same prospective buyer," the subagency compensation should be paid to whichever agent first procures a contract (IX Tr. 1943-44, 1964).

Based on the committee's finding that Action had influenced both the buyer and the seller to, in effect, refuse to deal with Ristom (P. Ex. 429, p. 43), the private letters of reprimand to Park and O'Connor were fully justified.

2. Prior Offense Record

The undisputed evidence showed that the establishment of the prior offense record was related to brokers who repeatedly committed ethical infractions, but "had nothing to do with Mr. Park" (VI Tr. 1261); that the committee received authorization to institute the prior offense record in August of 1977, well before any ethics complaint had been filed against Park (XIV Tr. 3025-26) and that referring to it as the "Park rule," Pet. 15, would be "ridiculous" (VI Tr. 1262). The Court of Appeals correctly noted that Petitioner's claim in this regard is "without support in the record and . . . pure speculation." 764 F.2d at 1062, App. 28.

3. Gunaca Complaint

Homeowners Jesus A. and Patricia Heredia, and Gunaca agent Michael L. Deaner, stated that Park "rudely interrupted" Deaner's explanation of the contract, and "confuse(d) and rattle(d)" them by his own "hurried" presentation. Park "became belligerent," "sarcastically objected to any private discussion," and "demanded" an immediate acceptance or rejection of the offer. Under the circumstances, the sellers felt that they "had no other choice but to say that the contract was not acceptable." Park then "grabbed up the contracts" and "stomped out of the house." After a subsequent explanation by Deaner, the Heredias concluded that they would have accepted the contract had they understood it (P. Ex. 420, tab 4, Heredia,

Deaner stmts.).[9] Heredia did not pursue the matter, however, because he did not want to have any further dealings with Park (VIII Tr. 1629-31; XIV Tr. 3206, 3226).[10]

Although Heredia testified that no one had ever come into his home and been as rude to him as was Park (XIV Tr. 3226), rudeness was not, contrary to assertion, Pet. 16, the only complaint. Heredia did not feel that Park had fulfilled his ethical obligation to represent his interest (XIV Tr. 3204, 3206, 3219).

On cross-examination, Park admitted that he had an ethical obligation to represent, protect, promote, and show absolute fidelity to, the Heredias' interests; and that he had not done so (V Tr. 940-71-73, 76-81). He had no right to deny a short private discussion between the owners and their listing agent (D. Gun. Ex. E, p. 40; D. Bd. Ex. D, Art. 22; VIII Tr. 1670-72).

The assertion, Pet. 17, that Gunaca diligently attempted to "punish" Park is unsupported by the record reference; Gunaca did feel that Park should not "just walk into a home . . . tromp on a home owner

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[9]On cross-examination, Park conceded that the Deaner statement was "basically true" and "correct" (V Tr. 940-83-86). Contrary to Petitioner's unsupported claim, Pet. 17, the Heredias confirmed and "reinforced" their statement to the committee investigator (VII Tr. 1363-64; XIV Tr. 3227). Heredia re-affirmed the accuracy of the statement at trial (XIV Tr. 3202, 3228).

[10]Heredia, as a member of the putative class in a companion class action case, was a witness to whom Park later "offered . . . some money" (XIV Tr. 3214) in connection with "a situation coming up where (Park) might go to court . . . if things turn out . . ." (XIV Tr. 3213; see also VIII Tr. 1546-47; X Tr. 2047).

and make them feel like they are a piece of dirt" (VIII Tr. 1639-41). Gunaca was on the committee when he filed the complaint against Park, but he was asked to leave, and did leave, the room where the committee was receiving an investigative report (VII Tr. 1315-17), and he resigned from the committee more than a month before its final determination of the complaint (VIII Tr. 1652, 1676-80; D. Gun. Ex. D). Contrary to assertion, Baca testified that he did not know of any ulterior motive underlying the complaint, and that he and the committee simply concerned themselves with whether there was in fact a legitimate complaint of unethical behavior (VII Tr. 1384).

The private letter of reprimand to Park dated May 9, 1978 was prepared and dated after the initial investigation, but was not changed prior to it being sent in early June, because the final investigation did not result in any changes to the letter initially proposed (XIII Tr. 2802-07). It was fully justified by, and consistent with, the undisputed facts.

The statement, Pet. 17, that Park's ethical infraction amounted to a "strike two" against him is totally unsupported by the record reference. The committee also sent Gunaca a letter of reprimand, but did not find Gunaca had committed an ethical violation, because it did not "have any basis" to do so (VII Tr. 1329-31, 1339).

4. Hicks Complaint

Hicks' complaint letter stated that Park had suggested to Hicks' former client, a Mr. Penney, that Penney "could triple the amount of money" he made on the sale of his home, if he would join Park in a

suit against Hicks' firm, Future, and that on another occasion, Park told Mrs. Penney that Mr. Penney should call him if he was "interested in making some money" (P. Ex. 420, tab 5, 5-8-78 ltr.). Park's written response to the committee investigator did not deny any of the factual allegations (*Id.*, 6-1-78 ltr.). Mrs. Penney's letter to the committee confirmed Hicks' report, and additionally stated that Park had told her that Hicks had "misrepresented her" (*Id.*, 6-22-78 ltr.). The Penneys indicated that they were willing to testify in support of the statement (III Tr. 445).

When Hicks later spoke to Park about the matter, Park denied that he had encouraged Penney to sue Hicks (X Tr. 2142, 2176). At trial, Park first testified that he went to see Penney to "determine if he was interested in becoming a Plaintiff in a class action lawsuit against the El Paso Board of Realtors," but that he did not discuss with the Penneys "anything at all . . . about suing Mr. Hicks or Future as a company or an individual" (III Tr. 566, 573). Finally, on cross-examination, Park admitted that he did talk to Penney about suing Hicks or Future (V Tr. 940-24-25).

Hicks, as part of an effort to "make peace" with Park and avoid being named as a defendant in this, and the contemporaneous class action, cases, told Park that he should not have filed the complaint, but testified that he believed that the complaint was "valid, very valid" (X Tr. 2103-04, 2162, 2179-80).[11] Con-

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[11]The claim that the investigator at one point told Park that she did not understand the allegations, Pet. 18, is based on hearsay not admitted to prove its truth (III Tr. 585).

trary to the assertion that the committee found Park guilty of an ethics violation in connection with this incident, the record references cited show that the committee simply referred the complaint to the Court of Ethics, which would have made its own determination of the matter (VII Tr. 1347-48). Its hearing would have provided for live testimony, opportunity for cross-examination, and representation by counsel (III Tr. 446-47). Typically in prior cases, if the Court of Ethics found an ethics infraction, it placed the offender on "probation," which did not result in any pecuniary loss or loss of the Board's services (III Tr. 448).

For all the evidence showed, no one has ever been expelled from the Board for an ethical infraction (II Tr. 157; VII Tr. 1359-60). The assertion, Pet. 19, 23, that Park would have been, and may yet be, expelled, was correctly rejected by the Court of Appeals as "without support in the record and . . . pure speculation." 764 F.2d at 1062, App. 28.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT ANY ISSUE THAT JUSTIFIES CERTIORARI REVIEW.

The Petition on its face demonstrates that this case involves simply the application of well-settled legal principles to an unusually large evidentiary record. In its lengthy, well reasoned opinion, the Court of Appeals carefully considered the evidentiary record, and correctly applied the applicable legal principles.

Certainly the Petitioner has not established any reasons of the character set out in Rule 17 for this Court's granting discretionary review. Petitioner has

totally failed to demonstrate that the Court of Appeals rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, much less that it decided a federal question in conflict with applicable decisions of this Court. He simply disagrees with the the Court of Appeals' assessment of the evidence, which is a matter uniquely ill-suited to certiorari review.

Furthermore, the Petitioner's unwarranted liberties with the Record discussed above, together with the faulty legal research (made evident below) supporting some of Petitioner's arguments, counsel against granting a writ in this case.

II. THE COURT OF APPEALS COMMITTED NO ERROR PREJUDICIAL TO PETITIONER.

A. THE COURT OF APPEALS CORRECTLY HELD THAT THE VERDICT AGAINST THE BOARD WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In his first question presented, Plaintiff suggests that the Court of Appeals "ignored the 'slight evidence' rule." In support of the proposition that only "slight evidence is needed to connect an individual conspirator to a conspiracy," Petitioner cites *Morton Salt Co. v. United States*, 235 F.2d 573 (10th Cir. 1956), which nowhere uses the phrase "slight evidence;" *Riss & Co. v. Association of American Railroads*, 187 F. Supp. 306 (D.D.C. 1960), in which the judgment entered against the defendants was subsequently reversed, *Association of Western Railways v. Riss & Co.*, 299 F.2d 133 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962); and five Fifth Circuit cases, the latest of which was decided in 1977.

Although the "slight evidence" rule was previously "allowed to worm its way into the jurisprudence of the Fifth Circuit," it was "*banished*" in *United States v. Malatesta*, 590 F.2d 1379, 1382 (5th Cir.)(en banc)(original emphasis), *cert. denied*, 440 U.S. 962, 444 U.S. 846 (1979). In *Malatesta*, the Fifth Circuit recognized that no decision of this Court had ever tested the sufficiency of the evidence to support a jury verdict in a conspiracy case by a "slight evidence" standard; and that instead, this Court's decisions have consistently employed the "substantial evidence" rule.

Moreover, the reversal by the Court of Appeals of the judgment against the Board did not hinge on application or not of the so-called "slight evidence" rule. The concept was not discussed or mentioned in the opinion. The Fifth Circuit found no substantial evidence indicating that the Board participated in any boycott conspiracy of the Petitioner. Significantly, the Court of Appeals did not render judgment in favor of the two other Appellants, because it found evidence, albeit "sparse," and possibly inadmissible, of their participation in a boycott conspiracy. 764 F.2d at 1064, App. 29.

Petitioner claims that the Court of Appeals "failed to consider" evidence against the Board, but then proceeds to simply repeat his contentions regarding the ethics complaints.[12] The Court of Appeals carefully

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[12]The only other matter raised by Petitioner involves alleged inconsistent positions taken by the Board concerning whether a commission change on an earnest money contract constitutes a counter-offer. Contrary to Petitioner's unsupported assertions, no evidence suggests that the Board ever took, or was called

examined the evidence regarding these matters. 764 F.2d at 1061-62, App. 25-29.

Petitioner cites two of this Court's cases for the proposition that arbitrary application of industry standards, or lack of minimal due process, "give rise to antitrust liability": *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); but has completely overlooked the latest expression from this Court on this issue, which demonstrates that these cases are of no avail to him: *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985). Petitioner also cites *Moore v. Boating Industry Associations*, 754 F.2d 698 (7th Cir. 1985), but fails to note that this Court has vacated the judgment in that case, and remanded for further consideration in light of the *Northwest Wholesale Stationers* case. *Boating Industry Associations v. Moore*, 106 S. Ct. 218 (1985).

In *Northwest Wholesale Stationers*, this Court held that the result in the *Silver* case was dictated by its conclusion that the Security Exchange Act's self-regulation provisions had partially repealed the Sherman Act, but only to the extent that the self-regulation was accompanied by adequate procedural safeguards. By contrast, where Congress has *not* provided for self-regulation, "the absence of procedural safeguards can in no sense determine the antitrust analysis. . . . If the challenged action would not amount to a violation of § 1, no lack of procedural protections would

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upon to take, inconsistent positions on this matter. The Court of Appeals did not specifically mention this claim in its opinion, probably because it is so patently unsupportable.

convert it into a *per se* violation. . . ." 105 S. Ct. at 2619. Because the substance of the challenged action, and its economic effect, rather than questions of procedural due process, determine the antitrust analysis in this case, Petitioner's reliance on *Silver* is entirely misplaced. Moreover, the Court of Appeals correctly concluded that Petitioner had "failed to present substantial evidence that the Committee acted in bad faith or abused its procedures . . .." 764 F.2d at 1062, App. 27.

In the *Radiant Burners* case, *per se* analysis was appropriate because the defendants there denied, and persuaded customers to deny, relationships to the plaintiff needed in the competitive struggle; the defendants denied necessary certification of the plaintiff's product, and thereby cut off access to a market necessary to enable it to compete. By contrast, in this case, the Board did not deny, nor did it persuade anyone else to deny, needed relationships to the Petitioner. It did not cut off the Petitioner from any supply, facility, or market necessary to enable him to compete. To the contrary, it immediately admitted Petitioner to membership as soon as he applied, and continuously provided to him every benefit of membership. The two private letters of reprimand received by the Petitioner were not only justified, they were economically insignificant. As the Court of Appeals correctly noted, "(t)wo reprimands do not an antitrust action make." 764 F.2d at 1062, App. 28.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT HAD ERRONEOUSLY AND PREJUDICALLY ALLOWED THE JURY TO CONSIDER HEARSAY ATTRIBUTED TO ALLEGED CO-CONSPIRATORS.

As acknowledged by Petitioner, *United States v. James*, 590 F.2d 575 (5th Cir.)(en banc), *cert. denied*, 442 U.S. 917 (1979), governed the actions of the lower courts. The findings that must be made by the trial judge under *James* were quoted by the Court of Appeals in its opinion, 764 F.2d at 1064, App. 33-34. The "findings" actually made by the trial court are also reported in the opinion of the Court of Appeals, 764 F.2d at 1065, App. 35. The trial court's "findings" were insufficient under *James* in several respects: The trial court did not state that it made its "findings" by a preponderence of the evidence; did not specifically find that all of the alleged co-conspirator declarants were members of a conspiracy along with the Defendants; and did not find that all the statements were made during the course and in furtherance of the alleged conspiracy. Thus, the Court of Appeals quite correctly concluded that the trial court had not made the required *James* findings.

Petitioner asserts that the trial court did comply with *James*, and cites for this proposition *United States v. Winship*, 724 F.2d 1116 (5th Cir. 1984). As correctly noted by the Court of Appeals, however, *Winship* is distinguishable, because there "the trial court failed to articulate its *James* findings, but implicitly applied the correct legal standard." 724 F.2d at 1065 n.17, App. 35 n.17. Here, the trial court neither articulated the required *James* findings, nor did it implicitly apply the correct legal standard. At

best, it applied a legal standard that was overruled by the adoption of the Federal Rules of Evidence. 764 F.2d at 1064-65, App. 32-33, 35.

The trial court's failure to make the required findings was not cured by its abdication of responsibility to the jury. Again, the cases cited by Petitioner in this regard are inapposite. In *United States v. Chaney*, 662 F.2d 1148, 1154 n.7 (5th Cir. 1981), and in *United States v. Monaco*, 702 F.2d 860, 878 (11th Cir. 1983), the defendants did not preserve error, because they did not request a *James* ruling at the close of all the evidence. As noted by the Court of Appeals, however, here "defense counsel clearly did need its burden of requesting a *James* ruling." 764 F.2d at 1065 n.16, App. 35 n.16.

Furthermore, the courts in *Chaney* and *Monaco* held that, in view of the evidence properly introduced, the failure to expressly articulate the required findings was harmless. 662 F.2d at 1153-54; 702 F.2d at 878. Similarly, in *United States v. Whitley*, 670 F.2d 617, 620 (5th Cir. 1982) the evidence that had been properly introduced made any error committed by the trial court harmless. By contrast, in this case the Court of Appeals specifically, and correctly, held, after reviewing all of the evidence, that the trial court's error was prejudicial, and required a new trial. 764 F.2d at 1065, App. 36.

C. THE COURT OF APPEALS CORRECTLY HELD THAT THE KEY ASSUMPTIONS OF PETITIONER'S DAMAGES MODEL LACKED A RATIONAL BASIS.

The Court of Appeals opinion accurately describes some of the principal defects of Petitioner's damages model, which rendered it irrational and purely spec-

ulative. 764 F.2d at 1067-68, App. 40-43. We do not read Petitioner's present apology for his expert's testimony to be a serious attempt to attack the correctness of the analysis utilized by the Court of Appeals.

Petitioner claims that the opinion of the Court of Appeals "does violence to the principles" of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), but does not specify why or how. The Court of Appeals opinion is completely consistent with these cases. In *Story Parchment*, this Court ruled that "damages may not be determined by mere speculation or guess," 282 U.S. at 563; held that some uncertainty in the proof of the amount of damages, caused by the defendant's own wrongful conduct, is not fatal to a plaintiff's case; *id.* at 563-65; and approved the use of a "before-and-after" method of damages proof. *Id.* at 561-62. Likewise, in the *Bigelow* case, this Court reiterated that some imprecision in damages calculations is permissible, where the defendant's wrongful action "prevented petitioners from making any more precise proof," 327 U.S. at 266, but that "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork," *id.* at 264; and again approved use of a "before-and-after" model of damages. *Id.* at 257-58, 266.

In the present case, the Court of Appeals correctly rejected the Plaintiff's damages model, because it was based on speculation and guesswork. The uncertainties included in Petitioner's expert's testimony were not uncertainties caused by the conduct of the

Defendants; they were uncertainties caused by the expert's own failure to analyze, or even to use, the relevant data available to him. He made no effort to utilize the "before-and-after" methodology used and approved in the *Story Parchment* and *Bigelow* cases; indeed, as correctly noted by the Court of Appeals, the "plaintiff's most profitable year ever was 1980, and his second most profitable year 1978, both years during which the boycott allegedly was in force." 764 F.2d at 1068, App. 42. He used no rational methodology at all.

D. THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT IN FAVOR OF THE DEFENDANTS-CROSS-APPELLEES ON THE BASIS OF THE JURY VERDICT AND THE TRIAL COURT'S FINDINGS.

The portion of the Petition dealing with the affirmance of the trial court judgment in favor of the Defendants-Cross-Appellees is, characteristically, confusing, incomplete and misleading.

The trial court, without objection from the Plaintiff, charged the jury as follows at the close of the evidence:

> There are four essential elements which the Plaintiff must prove by a preponderance of the evidence in order to establish his claim under the Sherman Act. They are as follows:
>
> First, that the El Paso Board of Realtors and its members, including the named Defendants in this case, engaged in a combination or conspiracy to fix the amount of real estate sales commissions on home resales *and* to engage in a boycott of the Plaintiff's business (XVII Tr. 3879-80) (emphasis added).

Furthermore, the court, without objection from the Plaintiff, defined price fixing so as not to involve any element that could have possibly caused injury to the Plaintiff. Thus, the court's instructions to the jury clearly contemplated that the alleged price fixing was not an independent basis of recovery (XVII Tr. 3884-85).

The jury refused to find that the Defendants-Cross-Appellees had "conspired or combined to boycott the Plaintiff for the purpose of excluding him from business or forcing him to change his commission practices" (8 R. 594, pp. 2142-43; App. 2-3). Petitioner did not appeal the jury's acquittal of the Defendants-Cross-Appellees on the boycott charge. Because the jury failed to find that they were members of a conspiracy to boycott the Plaintiff, it failed to find favorably for the Plaintiff on an "essential element" of his claim against them. Thus, the jury's answer to the boycott interrogatory compelled entry of the judgment in their favor.

Furthermore, as correctly noted by the Court of Appeals, the trial court found as a matter of fact that the alleged price-fixing conspiracy did not injure Petitioner.[13] For this additional reason, discussed at greater length in the opinion of the Court of Appeals, 764 F.2d at 1068-70, App. 43-46, the Court of Appeals correctly affirmed the judgment in favor of

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[13]The decision to enter a judgment in favor of the Defendants-Cross-Appellees was memorialized by the trial court in its Order on Motions for Judgment (8 R. 598, pp. 2086-87), quoted in pertinent part at 764 F.2d at 1069, App. 45. Inexplicably, Petitioner ignores the trial court's Order on Motions for Judgment, even though he probably should have included it in the Petition's Appendix, pursuant to Rule 21.1(k)(ii).

those Defendants who were exonerated of the boycott conspiracy allegation.

Although Petitioner primarily argues that, on the basis of the jury verdict, judgment should have been entered against the Defendants-Cross-Appellees, he argues in the alternative that he should be afforded a new trial as against them. The cases relied upon by Petitioner all involve situations where one or more counts of a general charge should not have been submitted to the jury. In each case where the court reversed the trial court's judgment, the complaining party had preserved error by objecting to the charge. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 25-27 (1962); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 79 (1907); *Morissey v. National Maritime Union*, 554 F.2d 19, 25 (2d Cir. 1976). By contrast, Petitioner made no objection to the pertinent portion of the court's charge to the jury. Nor did he file a motion for new trial, or to alter or amend the judgment. Nor did his Cross-Appellant's Brief in the Court of Appeals ask for a new trial.

Thus, not only are Petitioner's arguments totally without merit, he failed to lay the proper procedural predicate for presentation of those arguments to this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

S. ANTHONY SAFI
GRAMBLING & MOUNCE
P.O. Drawer 1977
El Paso, Texas 79950-1977
(915) 532-3911

Counsel for Respondents